(3)

Office - Supreme Court, U.S.
FILED
MAR 22 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1344

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SAGINAW MINING COMPANY,
Petitioner,

v.

LEWIS GIBAS,
Claimant-Respondent,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

and

THE BENEFITS REVIEW BOARD,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF IN OPPOSITION

IRWIN W. BARKAN, ESQ.
DANIEL L. MANRING, ESQ.
(Counsel of Record)
BARKAN & NEFF CO., L.P.A.
50 W. Broad St., P.O. Box 1969
Columbus, Ohio, 43216
Telephone: (614) 221-4221
Counsel for Claimant-Respondent Lewis Gibas

March 22, 1985

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

23 pp

THE QUESTION PRESENTED

WHETHER, IN A CLAIM FOR BLACK LUNG DISABILITY BENEFITS, THE REGULATION LIMITING THE METHOD OF REBUTTAL OF THE STATUTORY PRESUMPTION OF TOTAL DISABILITY IS WITHIN THE SECRETARY'S BROAD RULEMAKING AUTHORITY AND IS CONSISTENT WITH THE REMEDIAL PURPOSE OF THE BLACK LUNG ACT.

PARTIES TO THE PROCEEDINGS

This case involves adjudications of claims filed under the Federal Black Lung Act. The claimant-respondent is Lewis Gibas, Route 1, St. Clairsville, Ohio, a former employee of Petitioner. The U.S. Department of Labor, Employment Standards Administration, Office of Workers' Compensation Programs, 200 Constitution Ave, N.W., Washington, D.C., 20210 is also a Respondent. See 20 C.F.R. § 802.411(b). The Benefits Review Board, U.S. Department of Labor, 111 20th St., N.W., Suite 757, Vanguard Bldg., Washington, D.C. 20036, is a Respondent in name only. Rule 15(e), F. R. App P. Petitioner is the Saginaw Mining Company, P.O. Box 275, St. Clairsville, Ohio. Petitioner is a wholly owned subsidiary of the Oglebay Norton Company, 1100 Superior Avenue, Cleveland, Ohio.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
STATUTORY AND REGULATORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	3
I. THE COURT OF APPEALS PROPERLY FOUND THE "IN WHOLE OR IN PART" LANGUAGE OF 20 C.F.R. § 727.203(b)(3) TO BE CONSISTENT WITH THE BROAD REMEDIAL PURPOSE OF THE BLACK LUNG ACT AND WITHIN THE RULEMAKING AUTHORITY OF THE SECRETARY OF LABOR AS CONFERRED BY CONGRESS	3
II. THE COURT OF APPEALS CORRECTLY RULED THAT THE EMPLOYER-PETITIONER FAILED TO REBUT THE PRESUMPTION OF CLAIMANT'S TOTAL DISABILITY DUE TO PNEUMOCONIOSIS. THE BENEFITS REVIEW BOARD, IN HOLDING TO THE CONTRARY, ERRONEOUSLY OVERSTEPPED ITS LIMITED SCOPE OF REVIEW	10

TABLE OF CONTENTS—Continued

Page

III. THE COURT OF APPEALS, IN INTERPRETING 20 C.F.R. § 727.203(b), CORRECTLY FOUND THE BURDEN OF PERSUASION TO SHIFT TO THE EMPLOYER FOR PURPOSES OF ESTABLISHING REBUTTAL. THE REGULATION IN QUESTION IS CONSISTENT WITH THE EXPRESS AUTHORITY DELEGATED TO THE SECRETARY BY CONGRESS AND CLEARLY SERVES THE BROAD REMEDIAL PURPOSES OF THE BLACK LUNG ACT 13

CONCLUSION 17

TABLE OF AUTHORITIES

CASES: Page

Alabama By-Products Corp. v. Killingsworth, 733 F.2d 1511 (11th Cir. 1984) 5, 15, 16
American Coal Co. v. Benefits Review Board, 738 F.2d 387 (10th Cir. 1984) 14, 15, 16
Ansel v. Weinberger, 529 F.2d 304 (6th Cir. 1976) 12
Batterton v. Francis, 472 U.S. 416 (1977) 7
Bethlehem Mines Corp. v. Massey, 736 F.2d 120 (4th Cir. 1984) 5, 7, 9
Carozza v. U.S. Steel, 727 F.2d 74 (3d Cir. 1984) 5, 8
Clinchfield Coal Co. v. Fleming, 606 F.2d 441 (4th Cir. 1979) 9
Consolidation Coal Co. v. Smith, 699 F.2d 446 (8th Cir. 1983) 16
Hamilton v. New River Coal Co., 4 BLR 1-190 (1981) 11
Hampton v. Benefits Review Board, 678 F.2d 506 (4th Cir. 1982) 16
McCluskey v. Zeigler Coal Co., 2 BLR 1-1248 (1981) 16
Mourning v. Family Publications Service Inc., 411 U.S. 356 (1973) 6
NLRB v. Transportation Management Corp., 462 U.S. 393 (1983) 15
O'Keefe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965) 10
Peabody Coal Co. v. Benefits Review Board, 560 F.2d 797 (7th Cir. 1977) 10
Rose v. Clinchfield Coal Co., 614 F.2d 936 (4th Cir. 1980) 9
Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268 (1969) 7
United States v. Larinoff, 431 U.S. 864 (1977) 6
Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) 13, 14, 15, 16

STATUTES:

30 U.S.C. § 901 et seq. 2, 3, 14
30 U.S.C. § 902 ..... 3, 4

TABLE OF AUTHORITIES—Continued

	Page
30 U.S.C. § 902(f)(1)	7, 14
30 U.S.C. § 902(f)(2)	14
30 U.S.C. § 921(c)(1)	15
30 U.S.C. § 921(c)(2)	15
30 U.S.C. § 921(c)(4)	8
30 U.S.C. § 931	4
30 U.S.C. § 932(a)	10, 14
33 U.S.C. § 901 et seq.	14
33 U.S.C. § 921(b)(3)	2, 10
33 U.S.C. § 923(a)	14
REGULATIONS:	
20 C.F.R. § 727.202	6
20 C.F.R. § 727.203	14, 15, 16
20 C.F.R. § 727.203(a)(1)	2, 11
20 C.F.R. § 727.203(a)(2)	2, 11
20 C.F.R. § 727.203(b)(1)	4
20 C.F.R. § 727.203(b)(2)	4
20 C.F.R. § 727.203(b)(3)	*passim*
20 C.F.R. § 727.203(b)(4)	4
OTHER AUTHORITIES:	
43 Fed. Reg. 36,825 (August 18, 1978)	6
S. Rep. No. 95-209, 95th Cong., 1st Sess. 13-14 (1977)	8
S. Rep. No. 95-209, 95th Cong., 1st Sess. 17 (1977)	7
S. Rep. No. 95-209, 95th Cong., 1st Sess. 21 (1977)	7
Federal Rule of Evidence 101	14
Federal Rule of Evidence 301	13, 14, 16
Federal Rule of Evidence 1101	14
Larson, *The Law of Workmen's Compensation*, §§ 12.20-21 (1982)	8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1344

SAGINAW MINING COMPANY,
Petitioner,

v.

LEWIS GIBAS,
Claimant-Respondent,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

and

THE BENEFITS REVIEW BOARD,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF IN OPPOSITION

The claimant-Respondent respectfully submits his Brief in Opposition to the writ of certiorari requesting review of the judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on November 26, 1984.

OPINIONS BELOW

Under the federal statutes and regulations, "Black Lung" claims are first heard by an Administrative Law Judge (ALJ) of the Department of Labor. An "on the record" appeal lies to the Benefits Review Board (the

Board), and then to the United States Court of Appeals. 33 U.S.C. §§ 921(b) and (c).

The opinion of the ALJ in this case is not reported. A copy is in the Petitioner's Appendix, at 31a-37a. The Board's opinion is reported at 6 Black Lung Reporter (BLR) 1-18 (1983). A copy of it is at App. 19a-30a. The Court of Appeals decision is reported at 748 F.2d 1112 (Nov. 26, 1984). A copy of the decision appears at App. 1a-16a. The judgment is at App. 17a-18a.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are set forth in the Appendix to Petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

STATEMENT OF THE CASE

Claimant-Respondent, Lewis Gibas, is a former employee of Petitioner, the Saginaw Mining Company. Mr. Gibas alleges approximately thirty-four (34) years of coal mine employment and the employer concedes to twenty-four (24). During his working years, Mr. Gibas engaged in heavy labor and was exposed to very dusty conditions. Mr. Gibas was forced to discontinue his employment due to breathlessness, chest pain, and a chronic cough.

Claimant filed an application for benefits under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 901, et seq., as amended. Following a hearing held before an administrative law judge, claimant was found entitled to Black Lung disability benefits (Petitioner's Appendix to writ of certiorari 31a-37a). The administrative law judge ruled that claimant was entitled to the interim presumption of total disability due to pneumoconiosis under 20 C.F.R. § 727.203(a)(1) and (2). The administrative law judge based his decision on

positive x-ray evidence of pneumoconiosis, pulmonary function studies demonstrating a disabling respiratory impairment, and claimant's testimony. After carefully reviewing all the relevant evidence of record, the administrative law judge concluded that the employer had failed to establish rebuttal of the interim presumption by any of the four methods set forth at 20 C.F.R. § 727.-203(b). The rebuttal evidence, consisting of a medical report and deposition submitted by Dr. George Kress, was found to be insufficient by the administrative law judge to overcome the presumption.

Upon appeal to the Benefits Review Board, the Board reversed the ALJ's award of benefits. The Board invalidated the "in whole or in part" language of the rebuttal provision at 20 C.F.R. § 727.203(b)(3) and proceeded to reweigh the rebuttal evidence. After invalidating the regulation, the Board ruled that the employer had established rebuttal of the interim presumption.

Upon further appeal,, the Court of Appeals reversed the decision of the Benefits Review Board and remanded the case to the Board with instructions that benefits be awarded. The Court of Appeals held that the "in whole or in part" language of the rebuttal provision is consistent with the statute and represented a regulation within the rulemaking authority of the Secretary of Labor.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS PROPERLY FOUND THE "IN WHOLE OR IN PART" LANGUAGE OF 20 C.F.R. § 727.203(b)(3) TO BE CONSISTENT WITH THE BROAD REMEDIAL PURPOSE OF THE BLACK LUNG ACT AND WITHIN THE RULEMAKING AUTHORITY OF THE SECRETARY OF LABOR AS CONFERRED BY CONGRESS.

The Black Lung Act provides for the payment of benefits to coal miners who are totally disabled due to pneumoconiosis (black lung disease). 30 U.S.C. § 901, 902,

921 and 931. In 1977, the Black Lung Benefits Reform Act was passed, and the Secretary of Labor was expressly delegated the authority to define and establish criteria for determining what constitutes "total disability." 30 U.S.C. § 902(f). Pursuant to this delegation, the Secretary promulgated the "Interim Presumption" setting forth various medical standards which, if met by the claimant, trigger a *presumption* of total disability due to pneumoconiosis. 20 C.F.R. Part 727, § 203(a). If the claimant is found to be entitled to the invocation of the interim presumption, and thus entitled to the presumption of total disability due to pneumoconiosis, benefits are payable unless the employer establishes rebuttal of the presumption as provided by 20 C.F.R. § 727.203 (b).[1]

The employer contends that the method of rebuttal under § 727.203(b)(3), represents a deviation from the authority conferred upon the Secretary by the enabling Act. As written, subsection (b)(3) provides for rebuttal of the interim presumption if "the evidence establishes that the total disability . . . of the miner did not arise in whole or in part out of coal mine employment." 20

---

[1] 20 C.F.R. § 727.203(b) provides:

(b) Rebuttal of interim presumption. In adjudicating a claim under this subpart, all relevant medical evidence shall be considered. The presumption in paragraph (a) of this section shall be rebutted if:

(1) The evidence establishes that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

(2) In light of all relevant evidence it is established that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

(3) The evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment; or

(4) The evidence establishes that the miner does not, or did not, have pneumoconiosis.

C.F.R. § 727.203(b)(3). Under the "in part" language contained in subsection (b)(3), the employer claims that compensation is permitted if only part of a miner's disability arose out of coal mine employment. Employer concludes that this result is inconsistent with the Act's provision that a coal miner will receive benefits when his pneumoconiosis is disabling in and of itself.

The employer's position is untenable. The regulation in question, when interpreted in accordance with its plain language, is clearly consistent with the Black Lung Act, its legislative history, and well-settled principles of workers' compensation law. Every United States Court of Appeals which has confronted the issue presented here has rejected the employer's position.

> "The premise underlying Bethlehem's view of its rebuttal is mistaken. Pneumoconiosis contracted during coal mine employer must be a causative factor in the miner's total disability, *but it need not be the exclusive factor rendering the claimant totally disabled in order to be compensable under the Black Lung Act.*

Bethlehem Mines Corp. v. Massey, 736 F.2d 120, 123 (4th Cir. 1984) (emphasis added); *Carozza v. U. S. Steel*, 727 F.2d 74 (3d Cir. 1984); *Alabama By-Products Corp. v. Killingsworth*, 733 F.2d 1511, 1516 n.10 (11th Cir. 1984).

The Secretary's intent to compensate totally disabled miners whose disability arose at least "in part" from their coal mine employment is unquestionable. In commenting on the rebuttal provision in question, the Secretary left no doubt as to the rationale behind the regulation's expansive language:

> "The Department rejects the view that the significant aggravation of a pre-existing condition by coal dust exposure should not be considered as a basis for eligibility under the Act. It is a commonly agreed upon and salutary principle of workers' compensation

> law that an employer takes an employee with whatever underlying conditions the employee has. Accordingly, aggravation of a pre-existing condition to the point of disability is considered a proper basis for awarding benefits under many compensation laws. Contrary to the commentator's argument, this is a well-established principle under the Longshoremen's and Harbor Workers' Compensation Act [CHWCA], which Act sets the pattern for the consideration of claims under Part C of the Black Lung Benefits Act. The 'aggravation' question has caused considerable confusion in the past and the Department hopes that the clarification in this Section will put the matter to rest."

43 Fed. Reg. 36,825 (August 18, 1978). The Secretary's position is further evidenced in the definition of pneumoconiosis set forth at 20 C.F.R. § 727.203. "Pneumoconiosis means a chronic dust disease of the lung *and its sequelae* . . . For purposes of this definition, a disease 'arising out of coal mine employment' includes any chronic pulmonary disease resulting in respiratory or pulmonary impairment *significantly related to, or aggravated by,* dust exposure in coal mine employment. 20 C.F.R. § 727.202 (emphasis added).

The Secretary has been given considerable power under the Black Lung Act to formulate regulations controlling eligibility requirements. It is claimant's position that the power exercised by the Secretary in promulgating 20 C.F.R. § 727.203(b)(3) was well within the rulemaking authority delegated by Congress and served the broad remedial purposes of the Act.

Regulations, in order to be valid, must be consistent with the statute under which they are promulgated. *United States v. Larinoff*, 431 U.S. 865, 873 (1977). As long as a regulation is "reasonably related to the purposes of its enabling legislation," the validity of that regulation must be upheld. *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973), *quoting*

Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268, 280-81 (1969). One may find logical reasons for disagreeing with the apportioned proof burdens described in § 727.203(b)(3), but the litmus test of this regulation's validity is whether it complies with the provisions and purposes of the Black Lung Act. *Bethlehem Mines Corp. v. Massey, supra*, at 123. In the instant case, the regulation was promulgated by the Secretary, after notice and comment, pursuant to an express delegation of authority. 30 U.S.C. § 902(f)(1). The regulation is, therefore, entitled to the force and effect of law, and may not be overturned unless its promulgation is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Batterton v. Francis*, 472 U.S. 416, 425-426 (1977).

In enacting the Black Lung Benefits Reform Act of 1977, Congress directed the Secretary to promulgate regulations that "give the benefit of any doubt to the coal miner." Congress noted that many claims were being unjustly denied because "the state of the medical art is not sufficiently advanced to unequivocally identify occupationally related disability in coal mines. S. Rep. No. 95-209, 95th Cong., 1st Sess. 17, 21 (1977). The "in whole or in part" language of § 727.203(b)(3) "reflects the current uncertain state of medical knowledge concerning the exact consequences of prolonged exposure to coal dust." *Bethlehem Mines Corporation v. Massey, supra*, at 124. The Secretary's rebuttal regulation acknowledge this fact and, at the same time, serves to carry out the broad remedial purposes behind the Black Lung Act as articulated by Congress. The legislative purpose is clear: the effect of the recognized difficulty in medically determining the extent to which pneumoconiosis causes disability is to be placed on the employer by requiring it to show that pneumoconiosis was not even a partial cause of the miner's total disability.

The regulation's consistency with, and reasonable relationship to, the enabling Act is further evidenced in specific legislative history. This history indicates that Congress approved of compensation where pneumoconiosis is not the sole cause of a miner's total disability:

> "It is also intended that traditional workers' compensation principles such as those, for example, which permit a finding of eligibility where the totally disabling condition was significantly related to or aggravated by the occupational exposure be included in the regulations."

S. Rep. No. 95-209, 95th Cong., 1st Sess. 13-14 (1977). Under traditional workers' compensation law, compensation is proper where a work-related injury aggravates a pre-existing or non-work-related condition to the point of compensable disability, even if the work-related condition in and of itself is not compensable. This principle is well-stated in the expression that an employer takes his employee as he finds him. *Carozza v. U. S. Steel, supra*, at 78, n. 1. Larson, *The Law of Workmen's Compensation* §§ 12.20-12.21 (1982).

That Congress clearly intended for the Secretary to compensate miners whose disability arises from pneumoconiosis in combination with other impairments is demonstrated by judicial interpretations regarding an analogous statutory presumption. Section 411(c)(4) of the Act, 30 U.S.C. § 921(c)(4), provides that where an x-ray of a miner with 15 years of coal mine employment is negative for "complicated" pneumoconiosis, but other evidence establishes the existence of a total disabling respiratory impairment, there is a rebuttable presumption that the miner is totally disabled by pneumoconiosis. This presumption can be rebutted by establishing that the miner did not have pneumoconiosis or that "his respiratory or pulmonary impairment did not arise out of, *or in connection with*, employment in a coal mine"

(emphasis added). The Courts, in interpreting this provision, have held that the employer must demonstrate that the total disability was not caused *even in part* by coal mine employment to establish rebuttal. *Clinchfield Coal Company v. Fleming*, 606 F.2d 441 (4th Cir. 1979); *Rose v. Clinchfield Coal Company*, 614 F.2d 936 (4th Cir. 1980).

The employer's contention that the "whole or in part" language of the regulation improperly creates an almost impossible standard of rebuttal is unfounded. As previously indicated, legislative history reveals the remedial nature of the Black Lung Act. Moreover, Congress has expressed the view that claimants must not be unjustly denied benefits because of the medical uncertainty surrounding the nature of black lung disease. Thus, there is a clear indication that Congress approved of a scheme which places a substantial burden on the employer once the claimant has presented a *prima facie* case.

The reality of coal mine employment is such that many physical and environmental factors may converge to produce a totally disabling respiratory or pulmonary impairment. The Secretary's rebuttal regulation acknowledges this reality and, consistent with the letter and spirit of the Black Lung Act and traditional workers' compensation principles, places the burden on the employer to disprove the causal relationship between coal mine employment and total disability once the claimant establishes the existence of a qualifying medical condition. *Bethlehem Mines Corporation v. Massey*, *supra*, at 124. The Courts of Appeals that have confronted the regulation in question have uniformly found it to be reasonably related to the enabling Act. It is submitted that the "in whole or in part" language of § 727.203(b)(3) reflects the remedial nature and spirit of the Black Lung Act, and represents a proper exercise of the Secretary's rulemaking authority, and must therefore be upheld.

II. THE COURT OF APPEALS CORRECTLY RULED THAT THE EMPLOYER-PETITIONER FAILED TO REBUT THE PRESUMPTION OF CLAIMANT'S TOTAL DISABILITY DUE TO PNEUMOCONIOSIS. THE BENEFITS REVIEW BOARD, IN HOLDING TO THE CONTRARY, ERRONEOUSLY OVERSTEPPED ITS LIMITED SCOPE OF REVIEW.

The United States Court of Appeals for the Sixth Circuit correctly ruled that the Benefits Review Board erroneously reversed the decision of the administrative law judge who found claimant entitled to black lung disability benefits. The Board has a limited scope of review which is statutorily defined. If the administrative law judge's decision is supported by substantial evidence, is not irrational and is consistent with the applicable law, it is conclusive upon the Benefits Review Board and may not be disturbed. 30 U.S.C. § 932(a) incorporating 33 U.S.C. § 921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). In the instant case, the Board grounded its reversal on the ALJ's interpretation of the 20 C.F.R. § 727.203(b)(3) method of rebuttal (see Issue I). After finding the ALJ's interpretation of subsection (b)(3) to be improper, the Board then reweighed the evidence and found rebuttal to be established. As argued in the first issue of this brief, the Board erroneously invalidated the "in part" language found in 20 C.F.R. § 727.203(b)(3). The Board committed additional error, however, in reweighing the evidence for purposes of establishing rebuttal.

It is well settled that where findings of an administrative law judge, as the trier of fact, are supported by substantial evidence of record and discussed in a well reasoned opinion, the Board may not intervene to reweigh the evidence. All that is required is a rational correlation between the evidence presented and the decision reached by the administrative law judge. *Peabody Coal Co. v. Benefits Review Board*, 560 F.2d 797 (7th Cir. 1977). Where the administrative law judge weighed

all the relevant medical evidence of record and drew a reasonable conclusion based upon substantial evidence, the Board's scope of review does not extend to reweighing the evidence and drawing alternative conclusions. *Hamilton v. New River Coal Co.*, 4 BLR 1-190 (1981). The Board's independent evaluation of the evidence in this case, concerning the rebuttal issue, violated its limited scope of review.

The employer concedes that the administrative law judge properly invoked the interim presumption under 20 C.F.R. § 727.203(a)(1) based on positive x-ray evidence of pneumoconiosis. The employer, however, fails to acknowledge that the administrative law judge also found the presumption to be invoked under subsection (a)(2) (Petitioner's Appendix to writ of certiorari 34a). On the basis of pulmonary function studies performed by Dr. Del Vecchio, the administrative law judge concluded that the presumption of total disability due to pneumoconiosis must also be invoked pursuant to 20 C.F.R. § 727.203(a)(2).

For purposes of rebuttal, employer submitted the report and deposition of Dr. George Kress, M.D. Dr. Kress stated that claimant is totally disabled, but he attributed the disability to a cardiovascular impairment and not to claimant's pneumoconiosis. The administrative law judge, as trier of fact, evaluated all the relevant evidence and concluded that Dr. Kress' opinion was insufficient to establish rebuttal under § 727.203(b)(3).

In its decision below, the Court of Appeals found the administrative law judge's opinion to be supported by substantial evidence and to be free of factual and legal error:

> "The record before us reveals that the administrative law judge considered all of Saginaw's evidence. He expressly acknowledged Gibas' 'serious cardiovascular problems' and Dr. Kress' opinion that Gibas' disability was not caused by pneumoconiosis. Nonethe-

> less, the judge also found persuasive evidence that Gibas has pneumoconiosis, is disabled from shortness of breath and has been employed as a coal miner for twenty-four to twenty-nine years under dusty conditions (Petitioner's Appendix to writ of certiorari 15a-16a).

A review of the medical evidence and the administrative law judge's opinion supports the decision reached by the Court of Appeals.

Although Dr. Kress' opinion rejects claimant's pneumoconiosis as a contributing cause of his disability, the administrative law judge properly found Dr. Kress' opinion to be unpersuasive. First, Dr. Kress based his opinion, in part, on negative x-ray evidence. Positive x-ray evidence of pneumoconiosis exists in this claim, however. Moreover, negative x-rays do not constitute grounds upon which to deny a claim. *Ansel v. Weinberger*, 529 F.2d 304, 310 (6th 1976). Furthermore, ventilatory studies performed by Dr. Kress indicate, in the doctor's own words, a "moderately severe obstructive impairment." Add to these considerations the existence of Dr. Del Vecchio's diagnosis of pneumoconiosis, Dr. Del Vecchio's qualifying pulmonary function study values, claimant's extensive coal dust exposure and claimant's testimony, and it is clear that the administrative law judge properly found Dr. Kress' opinion insufficient to establish rebuttal of the interim presumption.

In reweighing the medical evidence, the Benefits Review Board transgressed its limited scope of review. The Court of Appeals correctly found the administrative law judge's opinion to be well reasoned and supported by substantial evidence. Accordingly, the Court of Appeals' decision should be affirmed.

III. THE COURT OF APPEALS, IN INTERPRETING 20 C.F.R. § 727.203(b), CORRECTLY FOUND THE BURDEN OF PERSUASION TO SHIFT TO THE EMPLOYER FOR PURPOSES OF ESTABLISHING REBUTTAL. THE REGULATION IN QUESTION IS CONSISTENT WITH THE EXPRESS AUTHORITY DELEGATED TO THE SECRETARY BY CONGRESS AND CLEARLY SERVES THE BROAD REMEDIAL PURPOSES OF THE BLACK LUNG ACT.

Once a claimant has met the medical criteria for invoking the interim presumption of total disability due to pneumoconiosis, the employer can rebut the presumption *if the evidence establishes* that the total disability of the miner did not arise in whole or in part out of coal mine employment. 20 C.F.R. § 727.203(b)(3) (emphasis added). In order to *establish* rebuttal, as stated by the Court of Appeals, the employer bears the burden of persuasion. Claimant contends that the shift of the burden of persuasion to the employer is indicated by the plain language of the regulation, the Congressional delegation of express authority to the Secretary to promulgate such regulations, and the remedial purposes of the Black Lung Act. The employer's contention that Rule 301 [2] of the Federal Rules of Evidence and the Court's decision in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), provide that only the burden of going forward with the evidence shifts to the employer on rebuttal (while the burden of persuasion or proof remains with the claimant) is without merit.

---

[2] Rule 301 of the Federal Rules of Evidence provides:

Rule 301. Presumptions in General in Civil Actions and Proceedings. In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

Contrary to the employer's contention, Federal Rule of Evidence 301 does not control the operation of the presumption in the instant case. The Federal Rules of Evidence, by their own provisions, apply only to proceedings in federal courts and before U.S. Magistrates. Fed. F. Evid. 101, 1101. They are not intended to apply to administrative hearings such as those held under the Black Lung Benefits Act. *American Coal Co. v. Benefits Review Board*, 738 F.2d 387, 390 (10th Cir. 1984). Furthermore, the text of Rule 301 indicates, in no uncertain terms, that the Rule applies only to "civil actions and proceedings not otherwise provided by these rules . . ." In this case, Congress has clearly "otherwise provided."

The Black Lung Benefits Act, 30 U.S.C. § 932(a), specifically incorporates by reference § 23(a) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq., § 923(a), which precludes mandatory application of "common law or statutory rules of evidence or . . . technical or formal rules of procedure" in adjudicating claims within the administrative process. Moreover, the inapplicability of Rule 301 is further evidenced by Congressional delegation of authority to the Secretary of Labor to promulgate regulations creating presumptions with limited rebuttal methods. *American Coal Co. v. Benefits Review Board, supra*, at 390. Limited rebuttal provisions are consistent with the broad remedial purpose of the Act and Congressional mandate that the Secretary's regulations *not be more restrictive* than the criteria applicable to claims filed on June 30, 1973. 30 U.S.C. § 902(f)(1) and (f)(2) (emphasis added).

In addition, claimant submits that the Court's holding in *Usery v. Turner Elkhorn Mining Co., supra*, does not require that the burden of persuasion remain with the claimant under § 727.203(b). In *Turner Elkhorn*, the Court stated that the presumptions under sections 411

(c)(1) and (2) of the Act, 30 U.S.C. § 921(c)(1) and (2), are "explicitly rebuttable, and the effect of each is simply to shift the burden of going forward with evidence from the claimant to the operator." *Usery v. Turner Elkhorn Mining Co.*, at 27. In distinguishing *Turner Elkhorn*, it is important to note that the Court's discussion centered on 30 U.S.C. §§ 921(c)(1) and (2). The presumptions involved in *Turner Elkhorn* are significantly different from the presumption at issue in this case. The presumptions set forth at Sections 921(c)(1) and (2) are merely described as "rebuttable"—the statute does not provide limited rebuttal provisions. In contrast, once the presumption is invoked the instant regulation, the rebutting party is limited to "establishing"[3] rebuttal by one of four *limited* methods. Thus, the presumption and *specific* rebuttal provisions under 20 C.F.R. § 727.203 materially differ from the bare presumption presented in *Turner Elkhorn*. In deciding the identical question presented here, the Court of Appeals for the Tenth Circuit concluded:

> "Finally, we note that the Supreme Court's reference to Rule 301 in *Usery v. Turner Elkhorn Mining Company* appears in a discussion expressly limited to consideration of 30 U.S.C. §§ 921(c)(1) and (2). Neither of these presumptions is at issue here, and neither limits the methods of rebuttal available to an employer.

American Coal Co. v. Benefits Review Board, at 390. By providing specific and very limited rebuttal provisions in

---

[3] The burden of persuasion may be judicially or legislatively assigned to a particular party to establish a particular fact. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, N. 7 (1983). The regulations' specific requirement that the employer must "establish" rebuttal is evidence that the burden of persuasion shifts to the employer on rebuttal. The Court of Appeals for the Eleventh Circuit stated that "establish" is clearly synonymous with "prove", and that the burden of persuasion rests with the employer for purposes of rebuttal. *Alabama By-Products v. Killingsworth*, 733 F.2d 1511, 1514 (11th Cir. 1984).

§ 727.203(b), the Secretary has clearly demonstrated that the burden of persuasion is shifted to the employer. Because the Court's decision in *Turner Elkhorn* dealt with presumptions materially different than the presumption under § 727.203(b), that case is not controlling.

In light of the foregoing discussion, it is apparent that the Court of Appeals properly placed the burden of persuasion on the employer for purposes of establishing rebuttal. Once a claimant invokes the presumption of total disability due to pneumoconiosis, the burden of production and persuasion shifts to the employer. The Circuit Courts and the Benefits Review Board have so held and are in agreement. *McCluskey v. Zeigler Coal Co.*, 2 BLR 1-1248, 1272-73 (1981); *Hampton v. Benefits Review Board*, 678 F.2d 506, 508 (4th Cir. 1982); *Consolidation Coal Co. v. Smith*, 699 F.2d 446, 449 (8th Cir. 1983); *Alabama By-Products v. Killingsworth, supra; American Coal Co. v. Benefits Review Board, supra.* Federal Rule of Evidence 301, by its own terms and by provision of Congress, is not applicable. The operation of the evidentiary scheme delineated by 20 C.F.R. § 727.-203(a) and (b) is consistent with Congressional intent, the remedial nature of the Act, and the applicable decisions of the lower courts. It is also important to note that the Court's holding in *Usery v. Turner Elkhorn Mining* does not mandate a different result. Therefore, it is submitted that the issues raised herein are well settled and do not present questions of federal law which must be addressed by this Court as the employer contends. Accordingly, the decision of the Court of Appeals should be affirmed and employer's Petition for Writ of Certiorari denied.

CONCLUSION

For the foregoing reasons, Claimant-Respondent submits that the decision of the Court of Appeals be affirmed. The Petitioner's Writ of Certiorari does not present an issue which has not been convincingly and uniformly decided by the various Courts of Appeals which have confronted the issues presented in Petitioner's Writ. Therefore, Claimant-Respondent respectfully submits that the Writ of Certiorari be denied.

Respectfully submitted,

IRWIN W. BARKAN, ESQ.
DANIEL L. MANRING, ESQ.
(Counsel of Record)
BARKAN & NEFF CO., L.P.A.
50 W. Broad St., P.O. Box 1969
Columbus, Ohio, 43216
Telephone: (614) 221-4221
Counsel for Claimant-Respondent Lewis Gibas

March 22, 1985